IN THE HIGH COURT OF JUDICATURE OF BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPLICATION NO.5628 OF 2004

Mahesh Ranka ... Applicant

versus

The State of Maharashtra & anr. ... Respondents

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Mr.Subhash Jha, for the Applicant.

Mr.V.B.Konde Deshmukh, A.P.P., for the Respondent No.1.

Mr.Abad H.H.Ponda, for the Respondent No.2.

...

CORAM : A.M.KHANWILKAR,J.

9th March 2005

P.C.:

. Heard Counsel for the parties. It is not necessary for me to go into the acrimonious debate raised by the rival side about the of service of this application on the Respondent. That is an unfortunate situation which has happened in this case, which was avoidable. The

members of the Bar will be well-advised that in future, such unpleasant occasion is not brought for consideration of the Court.

. This application is for setting aside order dated 28th October 2004 passed in Criminal Application No. 3219 of 2004 and order dated 8th July 2004 passed by the Additional Chief Metropolitan Magistrate, 24th Court, Borivli, in CR.No. 122/2004.

. The Respondent had moved an application for bail before the Magistrate in the said CR.No.122/2004 on the ground that the charge sheet has not been filed within the statutory period. The lower Court proceeded to allow the said application by order dated 8th July 2004 on the finding that the Respondent was arrested on 7th May 2004 and no charge sheet has been filed within the statutory period. That order was challenged by the Applicant before this Court by way of Criminal Application No. 3219 of 2004, which was rejected on 28th October 2004 having found that there was no infirmity in the order as passed by the Magistrate.

. However, in the present application, the Applicant asserts that the actual date of arrest of the Applicant in connection with CR.No.122/2004 was 13th May 2004, as mentioned by the Respondent in one of the applications filed before the lower Court. The learned A.P.P., on instructions, states that the correct date of arrest is 12th May 2004. The argument is that, if the date of arrest was 12th May 2004, there was no occasion for the Magistrate to invoke provisions of section 167 of the Cr.P.C., so as to enlarge the Respondent on bail on the ground of default on 8th July 2004, as 60 days were not completed.

. Ordinarily, this argument will have to be accepted. However, in the present case, the Applicant approached this Court by way of Criminal Application No. 3219 of 2004 and made no grievance in this behalf in the said application, or, when the Counsel for both sides were heard before me on 28th October 2004. In this view of the matter, Counsel for the Respondent is justified in contending that the

Court should be slow in interfering in the present application as that would amount to review of the order passed on 28th October 2004, on the ground, which was otherwise available to the Applicant at the relevant time and not pressed. To support this submission, reliance is rightly placed on the decision of the Apex Court reported in A.I.R. 1979 S.C. 87 in the case of State of Orissa v. Ram Chandar Agarwala, and another decision of the Apex Court reported in 1990 Cri.L.J. 1599 in the case of Mostt. Simrikhia v. Smt. Dolley Mukherjee alias Chhabi Mukherjee and another. In the latter decision, the Apex Court has observed that bar of section 362 of the Cr.P.C. will be lifted only when there was change in the circumstances of the case, so as to exercise inherent powers of the Court in the prevailing circumstances and pass appropriate orders to secure the ends of justice or to prevent the abuse of the process of the Court. The Apex Court has further observed that where there is no such changed circumstance and the decision has to be arrived at on the facts that existed on the date of the earlier order, the exercise of power to consider the same

material to arrive at a different conclusion is in effect a review, which is expressly barred under section 362 of the Code.

. To get over this position, Mr. Jha, for the Applicant, contends that it is a clear case of fraud played on the Court, as the Respondent was fully aware about his correct date of arrest in connection with the present offence; whereas, he succeeded in misleading the lower Court that the date of arrest was 7th May 2004 and which is the basis of the decision arrived at by the lower Court. He submits that if it is a case of fraud, the bar of section 362 of the Code will be of no avail to the Respondent and this Court is duty bound to remedy the mistake and pass appropriate orders as may be warranted in the ends of justice. He further submits that, in any case, there can be no bar of section 362 of the Code, as the present application is for the limited purpose of recall of the order passed by this Court on 28th October 2004, and inviting this Court to pass appropriate orders on the basis of fact situation emerging from the record of the Court. To buttress this submission, reliance is

placed on the decision of the Karnataka High Court, reported in 1989 Cri.L.J. 2382 in the case of Giridharilal and others v. Pratap Rai Mehta and another.

. The stand taken on behalf of the Applicant, however, does not commend to me. It is not possible to take the view that it is a case of fraud played upon this Court. Assuming that the Applicant is justified in saying that the Respondent misled the lower Court in concluding that the date of arrest was 7th May 2004, however, the fact remains that it is the Applicant who had come before this Court and could have made that grievance so as to persuade this Court to set aside the order of the Magistrate on that count. That is not what has happened in the present case. But the Applicant argued the matter before this Court accepting the position which has been noted by the Magistrate in his order that the Respondent was arrested on 7th May 2004. In that case, it is not possible to suggest that the Respondent had committed fraud even on this Court, because the Applicant never asserted the fact, which was available to

him to assail the correctness of the order passed by the Magistrate.

. Insofar as the argument of fraud is concerned, there is force in the argument of Mr.Ponda that the Applicant himself has mentioned the date of arrest of the Respondent as 7th May 2004 in the companion Criminal Application, which was moved before this Court and was heard together on the same date by this Court, being Criminal Application No. 3218 of 2004.

. Be that as it may, even the argument that the power to recall the order is not affected by the bar of section 362 of the Code overlooks that the remedy of recall is limited and circumscribed. Whereas, the argument as has been pressed into service before this Court will not come within the sweep of power to recall; for it is inviting this Court to review the order which has been passed on 28th October 2004 on the circumstances and facts, which were available to the Applicant and existed as on the date of the earlier order. No more and no less.

. A priori, it is not open for this Court to entertain the present application in the light of the exposition of the Apex Court in the case of Mostt. Simrikhia (supra).

. Hence, dismissed.

(A.M.KHANWILKAR,J.)